Cornell Law Review

Volume 102
Issue 1 *November 2016*

Article 4

Striking the Right Chord: A Theoretical Approach to Balancing Artists' Intellectual Property Rights on Remix Audio-Sharing Platforms

Nicole Greenstein

NOTE

STRIKING THE RIGHT CHORD: A THEORETICAL APPROACH TO BALANCING ARTISTS' INTELLECTUAL PROPERTY RIGHTS ON REMIX AUDIO-SHARING PLATFORMS

Nicole Greenstein†

† University of Pennsylvania, B.A., 2014; Cornell Law School, Candidate for J.D., 2017; Publishing Editor, *Cornell Law Review* Volume 102. I would like to thank Professor Gregory Alexander for contributing inspiration and thoughtful comments to this Note, as well as Professors Oskar Liivak and Michael Olivas for their excellent instruction in intellectual property. Thanks also to the members of the *Cornell Law Review* for their hard work in preparing this Note for publication. Last but certainly not least, I am grateful to my family and friends for their endless support throughout law school and all of my endeavors.

"Nothing is original. Steal from anywhere that resonates with inspiration or fuels your imagination. . . . Select only things to steal from that speak directly to your soul. If you do this, your work (and theft) will be authentic. Authenticity is invaluable; originality is nonexistent. And don't bother concealing your thievery—celebrate it if you feel like it."
- Jim Jarmusch[1]

INTRODUCTION

If you search for the popular electronic dance music track "Turn Down for What" on SoundCloud, the online audio-sharing platform, over 500 tracks will surface on your computer screen.[2] Most of these tracks are unofficial remixes from a variety of music genres, everything ranging from rap to reggae, blues to bhangra. Even though many of these unofficial remixes are available as free downloads, they were never authorized by the original artists, their publishers, or their record labels.[3] Instead, these tracks are homegrown creations, born out of the basements of aspiring, yet amateur, remixers. SoundCloud, the Swedish brainchild of two entrepreneurs who launched the site from a nightclub dance floor in 2008, prides itself on allowing anyone to create, upload, share, and download music.[4] The platform's self-proclaimed mantra celebrates the fact that "anyone can create sounds and share them everywhere."[5] Their mission resonated with the masses; SoundCloud boasts approximately 175 million monthly listeners—a base which more than doubles the size of Pandora's active monthly users and roughly doubles the size of Spotify's free user base.[6]

Despite its reputation as a leader in the remix space, SoundCloud has come under fire in recent years for serving as

---

1 Jim Jarmusch, *Things I've Learned: Jim Jarmusch*, MOVIEMAKER MAG. (June 5, 2013), http://www.moviemaker.com/archives/moviemaking/directing/jim-jarmusch-5-golden-rules-of-moviemaking/ [https://perma.cc/7J8S-CVQK].

2 Andy Hermann, *How Remix Culture Lives and Dies on SoundCloud*, DAILY DOT (Aug. 28, 2014, 10:00 AM), http://www.dailydot.com/entertainment/soundcloud-remix-problem/ [https://perma.cc/E8Y2-3BMK].

3 *See id.*

4 *See* Rob Walker, *Can SoundCloud Be the Facebook of Music?*, BLOOMBERG (July 10, 2015), http://www.bloomberg.com/news/features/2015-07-10/can-soundcloud-be-the-facebook-of-music- [https://perma.cc/9WAG-XH8P].

5 *About SoundCloud*, SOUNDCLOUD, https://soundcloud.com/pages/contact [https://perma.cc/JP9N-HKED].

6 Hannah Karp, *Universal Music Sets Licensing Deal with SoundCloud*, WALL STREET J. (Jan. 13, 2016, 9:00 AM), http://www.wsj.com/articles/universal-music-sets-licensing-deal-with-soundcloud-1452693603 [https://perma.cc/DHN7-LDMV].

a safe haven for copyright infringement.[7] While SoundCloud does flag certain unauthorized content for removal, the platform is notorious for letting users post remixes, mashups, and DJ sets created with copyrighted material from other sources.[8] Many have critiqued SoundCloud's laissez-faire attitude toward enforcing the material on its site, as artists, remixers, and labels can upload songs at their leisure so long as they agree to the site's terms and conditions.[9] Many remixers who post unauthorized content thrive under this laid-back approach, such as New Jersey club producer M. Breeze, whose remix of "Turn Down for What" has received over 15,000 streams.[10] "I was just hoping and praying I never received an email saying, 'Oh, hey, you gotta [sic] take your song down for copyright infringement,'" M. Breeze told *The Daily Dot*. As M. Breeze suspected, that email never came: "Never have I had to take anything down."

Although the word "remix" never appears in SoundCloud's terms of service, the terms explicitly ban "any Content to which you do not hold the necessary rights."[11] A company representative's statement makes SoundCloud's official stance on such content clear: "SoundCloud is a platform for creators to share their originally created sounds . . . . [W]here content is blocked or removed at the direction of rightsholders because the relevant rights have not been cleared, we need to take appropriate action as a responsible hosting platform."[12] Although SoundCloud could remove bootleg remixes at any time, a quick search on the site reveals vast amounts of unauthorized material.[13] Indeed, vigilant enforcement of copyright law would undermine the very inclusive, innovative atmosphere that

---

7 *See* Jonathan Keane, *Is SoundCloud Becoming More Popular than Spotify?*, PASTE MAG. (Feb. 17, 2015, 4:00 PM), http://www.pastemagazine.com/articles/2015/02/is-soundcloud-more-popular-than-spotify.html [https://perma.cc/RMW7-HKR9]; Ben Sisario, *SoundCloud Sued for Copyright Infringement by PRS for Music*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/business/media/soundcloud-sued-for-copyright-infringement-by-prs-for-music.html [https://perma.cc/3AYU-C5UW].

8 *See* Hermann, *supra* note 2.

9 *See* Ben Sisario, *SoundCloud and Universal Music Agree to Licensing Deal*, N.Y. TIMES (Jan. 13, 2016), http://www.nytimes.com/2016/01/14/business/media/soundcloud-and-universal-music-agree-to-licensing-deal.html [https://perma.cc/TVY2-LQMG].

10 *See* Hermann, *supra* note 2.

11 *SoundCloud Terms of Use*, SOUNDCLOUD, https://soundcloud.com/terms-of-use [https://perma.cc/T3GT-D4U4].

12 Hermann, *supra* note 2.

13 *See id.*

SoundCloud has created for its users to express their diverse artistic visions.

While SoundCloud continued to rise in popularity without paying any royalties, the outcry from record companies, artists, and agencies reached a crescendo.[14] Last year, PRS for Music, a British agency that represents songwriters, sued SoundCloud for copyright infringement, claiming that the streaming service was infringing on PRS members' copyrights by not obtaining licenses or paying royalties.[15] The record labels were also irked by their inability to profit off of SoundCloud's millions of listeners, many of whom were enjoying free tracks that infringed on the labels' own copyrights.[16] In 2014, SoundCloud finally announced a licensing deal with companies such as Red Bull, Jaguar, and Comedy Central to begin advertising on their site so that artists and record labels could collect royalties for the first time. Later that year, Warner Music Group became the first major record label to license its music to SoundCloud and receive royalties each time one of their songs is streamed on SoundCloud.[17] Warner receives royalties not just for streams of original songs but also when snippets of its songs are spliced into remixes. As part of the deal, Warner paid for an equity stake of three to five percent in the company and also indemnified SoundCloud against past copyright infringement.[18] This year, Universal Music Group and Sony followed suit with licensing deals of their own.[19] Although the record labels are still frustrated by the meager revenue that free, ad-supported music platforms generate, they have been assuaged by SoundCloud's recent launch of a paid subscription service

---

14 *See* Ben Sisario, *Popular and Free, SoundCloud Is Now Ready for Ads*, N.Y. TIMES (Aug. 21, 2014), http://www.nytimes.com/2014/08/21/business/media/popular-and-free-soundcloud-is-now-ready-for-ads.html [https://perma.cc/ZZ3X-C8X6].

15 *See* Sisario, *supra* note 9.

16 *See* Sisario, *supra* note 14.

17 *See* Hannah Karp, *Warner Music Group Signs Deal to License Music to SoundCloud*, WALL STREET J. (Nov. 4, 2014, 3:42 PM), http://www.wsj.com/articles/warner-music-group-nears-deal-to-license-music-to-soundcloud-1415127425 [https://perma.cc/V6KP-NHXY].

18 *See* Ben Sisario, *SoundCloud Signs Licensing Deal with Warner Music*, N.Y. TIMES (Nov. 4, 2014), http://www.nytimes.com/2014/11/05/business/media/soundcloud-signs-licensing-deal-with-warner-music.html?_r=0 [https://perma.cc/7BWE-F39W].

19 *See* Karp, *supra* note 6; Ben Sisario, *SoundCloud Signs Licensing Deal with Sony*, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/19/business/media/soundcloud-signs-licensing-deal-with-sony.html [https://perma.cc/8VCA-EURB].

in addition to its free platform that could potentially bring in more revenue.[20]

While the record labels may be satiated at the moment, however, SoundCloud's decision to move toward a paid, subscription model and work alongside the labels risks alienating the platform's primary user base. Remix enthusiasts have grown accustomed to the unlimited array of free music at their fingertips and SoundCloud's lenient approach toward infringing remixes. Remixers have thrived off of SoundCloud's spirit of digital democracy and fair use.[21] Without having to worry about securing content licenses from copyright holders, remixers have been free to focus solely on pushing the boundaries of the music industry. Indeed, the rise of electronic dance music, also known as EDM, is largely due to SoundCloud's remix community, and today this genre of music is one of the industry's most popular and profitable. Despite the value to society that remixers bring, some DJs have become so fed up with SoundCloud's ramped-up copyright enforcement that they have recommended abandoning SoundCloud in favor of alternative websites.[22]

The current debate between SoundCloud users and the music industry's artists and record labels expands beyond the boundaries of this one service. The Internet is filled with websites for remixers to share their creations, and sites like Mixcloud, Hype Machine, Indiloop, and Mixcrate continue to struggle with these same issues. How these audio-sharing platforms choose to balance the tensions between remixers and rightsholders in the near future may have a long-lasting impact on many facets of the music industry. These decisions will impact how listeners consume music, how DJs produce music, and how record labels pursue copyright infringement claims against audio-sharing services.

By analyzing this issue through the lens of both classic and contemporary property theories, this Note sets out to uncover the heart of the debate that pits a collaborative remix culture against artists' intellectual property rights. Part I of this Note provides background information on the intersection between

---

20 *See* Karp, *supra* note 17.

21 *See* David Holmes, *Death to Remixes: The Enormous Hidden Threat of Soundcloud's ZEFR Partnership*, PANDO (Apr. 10, 2015), https://pando.com/2015/04/10/soundcloud-begins-to-take-down-unauthorized-remixes-to-appease-labels-and-advertisers/ [https://perma.cc/JD9F-RLZS].

22 *See* Phil Morse, *Why You Shouldn't Post Your DJ Mixes on SoundCloud*, DIGITAL DJ TIPS (Mar. 11, 2011), https://www.digitaldjtips.com/2011/03/why-you-shouldnt-post-your-mixes-on-soundcloud/ [https://perma.cc/J2LB-QUFF].

intellectual property rights and audio-sharing platforms in the remix context. Part II explores John Locke's labor theory and its application to intellectual property in the digital era. Part III employs classic utilitarian theory to evaluate the free rider problem on digital music-sharing platforms, followed by an application of Yochai Benkler's more modern "freedom in the commons" theory. Part IV examines how Margaret Jane Radin's personhood theory applies to musicians and remixers in the intellectual property context. Part V concludes with an application of these property theories to several potential solutions that attempt to find the optimal balance between original artists and remixing artists—two types of creators with interests that, while diametrically opposed, are each robustly justified in their own way.

I
BACKGROUND

A. The Rise of Remix Culture and the Copyright Backlash

Before there were remixes, artists primarily engaged in sampling, or "[t]he process of taking a small portion of a sound recording and digitally manipulating it as part of a new recording."[23] Although many artists are inspired by the work of artists from previous generations, sampling allows musicians to quite literally take pieces of these creations and build upon them in a way that adds new meaning.[24] Thanks to advances in technology, sampling first arose in Jamaica in the 1960s through musical compositions known as "dub[s]."[25] Sampling then found its way to the United States, where it gained widespread acceptance throughout the hip-hop genre.[26]

Hip-hop is no longer the only genre of music to utilize sampling.[27] Whereas hip-hop music often requires a studio producer to appropriate a prior work and infuse it into a new song, a second type of sampling-based music, the remix, is more user-friendly. Those with software on their personal computers can mix several prior works together, alter the musical

---

23 *Sampling*, BLACK'S LAW DICTIONARY (9th ed. 2009); *see* RONALD S. ROSEN, MUSIC AND COPYRIGHT 568 (2008).

24 *See* Robert M. Vrana, Note, *The Remix Artist's Catch-22: A Proposal for Compulsory Licensing for Transformative, Sampling-Based Music*, 68 WASH. & LEE L. REV. 811, 820 (2011).

25 *See* JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 30 (2005) (tracing the beginning of sampling to Jamaican DJs).

26 *See id.* at 41–85 (describing the migration of sampling from Jamaica to the Bronx and its importance in early hip-hop).

27 *See* Vrana, *supra* note 24, at 821–22.

qualities of these songs, and then create new pieces of music to overlay on top of them.[28] Professional remix music has recently started to appear on pop radio stations, with renowned DJs making appearances on Top 40 stations.[29] Despite the popularity of this new music form, copyright law has struggled to adapt.

Sampling initially went unnoticed by the legal regime. Bands such as the Beastie Boys utilized sampling heavily throughout their work at a time "when record companies were paying less attention to these legal issues."[30] Courts soon began to recognize the legal implications, however, and held that unlicensed sampling constituted copyright infringement.[31] Many copyright critics have lamented this outcome for depriving the music world of truly pioneering art.[32] One notable example is DJ Danger Mouse's *The Grey Album*, which fused the rhythms and chords from the Beatles' *White Album* with the lyrics from rapper Jay-Z's *Black Album*. Despite music critics' praise for the record as an innovative masterpiece, executives at EMI, the label that owns the rights to the Beatles' sound recordings, sent a cease and desist order to DJ Danger Mouse along with the record stores and eBay retailers that were selling his remix album.[33] As a result of this debacle over DJ Danger Mouse's work, Glenn Otis Brown, the executive director of a Web-based copyright-licensing group called Creative Commons, criticized the U.S. copyright system as "two-tiered" for treating commercial albums differently than unofficial remixes released in the depths of the digital remix scene.[34] "Labels are saying, 'If you do (a remix) on the underground scene, it's OK.

---

28 *See id.* at 822.

29 *See id.* at 827.

30 *See id.* at 820–21 (quoting Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1).

31 *See* Grand Upright Music Ltd. v. Warner Bros. Records, 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (citing the Old Testament's declaration that "[t]hou shalt not steal" and holding that "stealing" music by sampling constitutes copyright infringement (quoting *Exodus* 20:15)).

32 *See* Noah Shachtman, *Copyright Enters a Gray Area*, WIRED (Feb. 14, 2004), http://archive.wired.com/entertainment/music/news/2004/02/62276?currentPage=all [https://perma.cc/P7UZ-YW65].

33 *See id.* (citing outstanding reviews of *The Grey Album* by publications such as *The Boston Globe* ("the most intriguing hip-hop album in recent memory") and *Rolling Stone* ("[t]he ultimate remix record") (quoting Renee Graham, *Jay-Z, the Beatles Meet in 'Grey'* Area, BOS. GLOBE (Feb. 12, 2004), http://archive.boston.com/news/globe/living/articles/2004/02/10/jay_z_the_beatles_meet_in_grey_area/ [https://perma.cc/63X2-CJSJ]; Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLING STONE (Feb. 5, 2004), http://www.rollingstone.com/music/news/dj-makes-jay-z-meet-beatles-20040205 [https://perma.cc/W2GS-83UT]).

34 *Id.*

But if it's so compelling that people trade it all over the Internet, then we're going to sue you.'"[35]

B. Licensing Sampling-Based Music

The Copyright Act of 1976 grants copyright holders the exclusive right to create "derivative works," or works that are based upon the copyrighted work.[36] The Copyright Act notes that a derivative work can take any "form in which a work may be recast, transformed, or adapted."[37] The broad scope of this derivative works right allows artists to create and sell remixes of their own songs. Additionally, artists can choose to license their songs to remixers, which ensures that the original artists receive compensation in return.

The process of licensing music seems simple on its face. Before an artist can sample copyrighted music, that artist must secure separate permission for both the sound recording and the composition of the copyrighted work.[38] For sound recordings, often the copyright owner is a record company or the record producer. For compositions, the copyright owner is generally the songwriter. These ownership interests, however, are often assigned to blanket licensing organizations or music publishers, who then offer access to their music catalogues to those who are willing to pay. Licensing agreements to sample another's work generally include terms that define whether the license is exclusive or nonexclusive, the term of the agreement, the payment method (flat fee, royalty, or both), the rights of the licensee (including how much of the song can be sampled), a courtesy credit to the owner if the owner desires, and rights of the owner (such as the right to terminate upon breach of the agreement).

This process can be burdensome for artists for a whole host of reasons. An artist might desire to sample many tracks for a song or lack knowledge regarding the licensing process. Alternatively, a rightsholder might demand a prohibitively expensive price for the license or refuse to approve the license altogether.[39] Fees and conditions for licenses vary greatly, but when a song is not well known and only a small portion of it will

---

35 *Id.*

36 17 U.S.C. § 106 (2012).

37 17 U.S.C. § 106 note (2012) (General Scope of Copyright).

38 AMBER NICOLE SHAVERS, THE LITTLE BOOK OF MUSIC LAW 199–200 (2013).

39 *See id.*

be used, flat fees generally fall between $1,000 and $5,000.[40] For more popular songs, prices range closer to $5,000 and $50,000 per license. Even if an artist successfully secures a licensing agreement, artists also have to be careful not to infringe on the agreement.[41] Such was the case with the English rock band, The Verve, who sampled a portion of an orchestral version of The Rolling Stones' "The Last Time" for their hit song, "Bittersweet Symphony."[42] The riff from the sample became the song's signature feature, though the band incorporated additional layers of melody, harmony, original lyrics, and other changes. The Verve successfully secured permission to sample both the sound recording and the composition of "The Last Time," and upon release "Bittersweet Symphony" became a wild success.[43] Once the song became popular, however, the owner of the composition copyright for "The Last Time" claimed that the band had infringed upon his copyright by sampling more of the track than they had previously agreed upon. Rather than face the prospect of drawn-out litigation, The Verve agreed to settle with the copyright owner for a high price—100% of the publishing rights for "Bittersweet Symphony."

C. Remixes and the Fair Use Defense

Despite its popularity as a music genre, the legality of user-generated remixes remains murky.[44] This is no surprise, given that such remixes rely on a fair use doctrine that is intentionally flexible and contextual.[45] The doctrine of fair use is an exception within federal copyright law and a remixer's dream.[46] Fair use allows creators to use an author's copyrighted work without permission and serves as a defense against liability for copyright infringement.[47] Courts evaluate these unauthorized uses on a case-by-case basis using four factors set out in Section 107 of the Copyright Act: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the

---

40 *See* Reuven Ashtar, *Theft, Transformation, and the Need of the Immaterial: A Proposal for a Fair Use Digital Sampling Regime*, 19 ALB. L.J. SCI. & TECH. 261, 273 (2009).

41 *See* SHAVERS, *supra* note 38, at 203.

42 *See id.* at 198.

43 *See id.* at 201.

44 *See* Vrana, *supra* note 24, at 837.

45 *See id.* at 833, 841.

46 *See* SHAVERS, *supra* note 38, at 215.

47 *See id.* at 215–16.

copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Of these four factors, the first one—the purpose and character of the use—often holds the most weight. For this factor, courts ask whether the new work is "transformative" or whether it alters the original in a way that adds new meaning, expression, or message.[48] As this multifactor test illustrates, the line dividing copyright infringement and fair use is highly contextual; "there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission."[49]

Section 107 singles out examples of activities that are generally regarded as fair use, such as criticism, comment, news reporting, teaching, scholarship, and research.[50] Another type of activity that often qualifies as fair use is parody.[51] Such was the case with the landmark case of *Campbell v. Acuff-Rose Music, Inc.*, where hip-hop group 2 Live Crew created a satiric take on the popular Roy Orbison song, "Oh, Pretty Woman." The Supreme Court found that 2 Live Crew's song "reasonably" commented on or criticized the original and that this social commentary rendered the track sufficiently transformative to qualify for the fair use defense.[52]

When it comes to remixes, however, case law on fair use is very scarce.[53] The first case to address sampling, *Grand Upright Music Ltd. v. Warner Brothers Records*, involved rapper Biz Markie's unlicensed sampling of an instrumental section and three-word phrase from the song "Alone Again (Naturally)" by singer-songwriter Gilbert O'Sullivan. While this case might seem ripe for fair use analysis, the judge concluded that Biz Markie committed copyright infringement without considering fair use at all. Instead, the judge noted that "[t]he only issue . . . seems to be who owns the copyright to the song 'Alone Again (Naturally)' and the master recording thereof made by Gilbert O'Sullivan."[54] A more recent sampling case, *Bridgeport*

---

48 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

49 *More Information on Fair Use*, U.S. COPYRIGHT OFF., http://copyright.gov/fair-use/more-info.html [https://perma.cc/A9WE-CBF4].

50 17 U.S.C. § 107 (2012).

51 *See Campbell*, 510 U.S. at 579 (establishing that commercial parodies can qualify for fair use status).

52 *See id.* at 583; SHAVERS, *supra* note 38, at 217.

53 *See* Vrana, *supra* note 24, at 834–38.

54 *See* 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

Music, Inc. v. Dimension Films, involved the hip-hop group N.W.A.'s recording, which sampled a three-note guitar solo from a Funkadelic recording.[55] The court originally seemed to follow in the footsteps of *Grand Upright Music* and succinctly directed artists to "[g]et a license or do not sample."[56] The court later amended its opinion to allow the district court to consider fair use on remand, sending mixed signals to remixers in the process.[57]

The lack of clear guidelines for remixers has led to much confusion about how the fair use doctrine applies to their craft. This confusion presents unique problems for audio-sharing platforms that remove remixes from their websites, despite the fact that many people believe these works satisfy the requirements of fair use. Among these fair use advocates is acclaimed mash-up artist Gregg Gillis, also known as Girl Talk, as well as his congressman, Representative Mike Doyle, who defended Gillis during a hearing on the future of radio.[58] While the debate between remix enthusiasts and copyright holders rages on in Washington, the national press, and the DJ community, an examination of traditional and contemporary property theory sheds some unexpected yet highly valuable insight onto this issue.

II
A REMIXER'S LABOR OF LOVE: LOCKEAN THEORY OF INTELLECTUAL PROPERTY

A. An Introduction to Locke's Labor Theory

John Locke revolutionized property theory with his insight that an individual who mixes his labor with an unowned resource acquires a natural property right in the final resource that he creates.[59] If a craftsman wanders onto a pristine forest, chops down a big oak tree, and transforms the lumber into beautiful birdhouses, he has therefore earned a property right in the birdhouses. Through his labor, he privatized that which had previously been in the state of nature. Locke reasoned that humans have natural property rights in their own persons and

---

55 *See* 410 F.3d 792, 795–96 (6th Cir. 2005).

56 *Id.* at 801.

57 *See* Vrana, *supra* note 24, at 838–39; Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES (Aug. 6, 2008), http://www.nytimes.com/2008/08/07/arts/music/07girl.html?_r=0 [https://perma.cc/A4KN-GQ9W].

58 *See* Holmes, *supra* note 21.

59 *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 36–37 (2012).

by extension, in their own labor.[60] The source of his theory comes from natural law, which confers rights and duties onto human beings, as God's "property."[61] These rights and duties include the duty to preserve oneself and the corresponding right to use natural resources in furtherance of fulfilling this obligation.[62] Locke qualifies his theory, however, with two major constraints. First, a person may not appropriate more than he can use before it spoils.[63] Second, a person may appropriate out of the commons only where "there is enough, and as good left in common for others."[64] These two constraints are often referred to as the "spoilage proviso" and the "sufficiency proviso," respectively.

As timeless and celebrated as Locke's theory is, it also has received its fair share of criticism. One primary contention with labor theory is that Locke does not justify his assumptions.[65] Locke simply assumes natural law grants us property rights and, consequently, that we have a robust property right to the resources from our labor—rather than a mere use right, for example. Robert Nozick illustrated the holes in labor theory with his clever musing: "If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"[66]

One reading of Locke presents an appealing alternative to Nozick's objection. James Tully interprets Locke's labor-mixing argument as a broader commitment to the principle that a maker is entitled to own the things that she intentionally brings into being.[67] Indeed, this notion of makers' rights appears throughout Locke's writings. Tully's reading explains not only why labor confers ownership rights over the resulting resource but also why Locke assumes a maker owns her labor to begin with—because she creates this labor by exercising her own intellect and will.

While Tully's reading leaves open questions of the exact extent of property rights created from labor, some scholars have responded by highlighting one of Locke's key assertions:

---

60 *See id.* at 37–39.
61 *See id.* at 39.
62 *See id.* at 37.
63 *See id.* at 39–40.
64 *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 27 (Mark Goldie ed., 1993)).
65 *See id.* at 46–51.
66 *Id.* at 46 (quoting ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 46 (1974)).
67 *See id.* at 47–48.

"the greatest part of the value in things is the result of human labor."[68] Locke's discussion focuses on use value rather than exchange value; the usefulness of products to those who consume them, Locke claims, is mostly due to the human labor that went into creating such products, regardless of how such products are valued in the market.[69] In Nozick's juice hypothetical, for instance, his labor of spilling the juice can did not add any value to a vast and still pristine sea. Yet if a laborer contributes more to the use value of the final product than the value of the raw materials that were taken from the commons, the justification for embracing the labor theory is far more persuasive, though not infallible. The value-argument reading is a key element of Lockean theory; however, there are still several unresolved issues that pose problems. For example, how should property law measure the value an individual adds to a product, and moreover, what happens when a product is created through cooperative labor between more than one person?[70]

B. A Lockean Approach to Intellectual Property and Remix Rights

Some scholars have called for a renunciation of intellectual property rights in the digital era simply because they believe that enforcing copyrights in an age where information can be freely obtained and copied is a virtual impossibility.[71] Yet "[c]opy-protection schemes are currently available for any kind of intellectual property that takes digital form."[72] Indeed, SoundCloud recently implemented an "automatic content identification system" that identifies audio that rightsholders have requested to be removed from SoundCloud.[73] Traditional policies of copyright law should be retained in the intellectual property context, and here Locke's labor theory still bears force.

First, Locke's natural law foundation for labor theory applies not only to physical property but also to intellectual prop-

---

68 *Id.* at 48.

69 *See id.* at 49.

70 *See id.* at 48–50.

71 *See* John Perry Barlow, *The Economy of Ideas*, WIRED (Mar. 1, 1994, 12:00 PM), http://www.wired.com/1994/03/economy-ideas/ [https://perma.cc/9MBX-JDTV].

72 Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLINE L. REV. 65, 72 n.45 (1997).

73 *Q&A: Our New Content Identification System*, SOUNDCLOUD (Jan. 5, 2011), https://blog.soundcloud.com/2011/01/05/q-and-a-content-identification-system/ [https://perma.cc/92GQ-JVFR].

erty. If God granted man the right to appropriate apples from a tree for self-preservation, surely this right extends to those who preserve themselves through labor not just of the body but also of the mind.[74] In the same way that a farmer feeds his family by tilling the land and harvesting crops, so too does a musician feed her family by creating songs for others to enjoy. Second, the maker's rights interpretation not only fits within the physical property context but it also applies to intellectual property in a more robust way. If we have a right to assert control over a tree that grows in a forest, surely we have a right to control "the contents of our minds," such as our thoughts, ideas, and inspirations.[75] Whereas our craftsman might have doubled the value of raw timber by transforming it into a birdhouse, for instance, a musician who creates a song seemingly out of nothing has certainly contributed more use value to the final product because she has not taken anything out of the commons. Third, Locke's constraints on his theory are also less of a threat in the world of intellectual property. The spoilage proviso is not at issue because ideas cannot spoil like apples on a tree. Similarly, the sufficiency proviso only becomes a threat in a situation with limited resources, but ideas are virtually limitless.

Although Locke's labor theory initially seems stronger in the intellectual property context, certain loopholes that plague Lockean theory in the tangible context still plague the theory in the world of intellectual property, too. For instance, while it might be easier to say that an artist has contributed the majority of her song's value than it is to say the same for an appropriation in the commons, she is not *truly* creating her song out of nothing. All artists draw inspiration from those who have come before them. Artists are inspired by different musical genres and lyrical styles, which would not be in existence without the labor of others. Artists even rely on inventors of instruments such as the piano and the guitar, as well as equipment such as the mixing boards used in studios. Isolating the individual value that an artist adds is difficult in the intellectual property context, just as it is in the physical property context.[76]

Another loophole that casts shadows onto an application of labor theory to intellectual property is the Lockean "paradox of plenty," which seems to be absent from the intellectual property context.[77] Coined by Gopal Sreenivasan, the paradox of

---

74 *See* Moore, *supra* note 72, at 77.

75 *See id.* at 78.

76 *See* ALEXANDER & PEÑALVER, *supra* note 59, at 49.

77 *See id.* at 39.

plenty notes that if every individual in the commons had to give actual consent before someone could pick apples from a tree and consume them, for example, everyone would starve in spite of the bountiful resources that God has provided. Yet intellectual property is not rivalrous like physical goods are.[78] Only one person can consume a physical good at a time, whereas a song can be enjoyed by millions of people simultaneously across airwaves or platforms like SoundCloud. Given this key distinction, the need for Lockean labor theory seems less pressing in the intellectual property context.

If an artist has the exclusive right to use and control her work, however, the second of Locke's provisos also poses problems in the realm of intellectual property. Artists must leave "enough, and as good" for others in the commons.[79] On the one hand, this proviso seems impossible to violate. Whereas a finite amount of resources is available to appropriate in the world of physical property, there is a nearly infinite frontier from which artists draw inspiration: their imagination. Artists can always create new songs; one artist's original song will not prevent another artist from later creating an original song of her own. On the other hand, certain artists create their work exclusively by taking preexisting songs and putting their own spin on them. Indeed, this is precisely what professional remixers and DJs do in their careers. Gregg Gillis of Girl Talk is famous for his "mash-ups" of songs by other artists.[80] Gillis does not pay these artists licensing fees, despite the fact that he makes sales off of his albums and sold-out stadium shows. For a DJ who uses hundreds of samples to create his work, it might very well be prohibitively expensive for Gillis to purchase a license from each and every artist. Moreover, if artists refused to grant licenses for their songs or required steep royalties, these obstacles might endanger the work that Gillis does. In this way, artists might not leave "enough, and as good" in the commons for those who make their living in the remix realm of the music industry. Remixers require access to society's "preexisting cultural matrix" to create their craft, and excluding remixers from accessing the songs that comprise this

78 *See* Moore, *supra* note 72, at 77.

79 *See* ALEXANDER & PEÑALVER, *supra* note 59, at 39–40 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 27 (Mark Goldie ed., 1993)).

80 Rob Walker, *Mash-up Model*, N.Y. TIMES MAG. (July 20, 2008), http://www.nytimes.com/2008/07/20/magazine/20wwln-consumed-t.html [https://perma.cc/R69A-TTDH].

culture can stifle their creativity.[81] The public domain therefore might not be as accommodating as Lockean theory would suggest that it should be. This proviso could have interesting implications for government regulation of copyright, as a compulsory licensing system would allow remixers access to a far wider range of music, all the while promoting the enforcement of copyright law.[82]

While these contradictions cast doubt on a robust regime of Lockean rights in intellectual property, this is not to say that these complications mandate a wholesale renunciation of labor theory in this context. Rather, a well-rounded approach should accordingly temper property rights with qualifications as justified. Indeed, copyright law in the United States currently carves out room for such exceptions. Most notably, the fair use doctrine permits the unauthorized use of copyrighted material when a use is transformative, or "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[83] The court's logic behind transformative use is consistent with Lockean theory, as transformative parodies are deemed to have added the bulk of the use value of the final product. If a parody's commentary has "no critical bearing on the substance or style of the original composition," that parody is more likely to succeed on a fair use defense than if the parody merely serves as a "market substitute" for the original.[84] Given that fair use must be decided on a case-by-case basis, however, it puts remixing artists in a vulnerable position. Even if a remixing artist truly believes that they have met the requirements of fair use, they cannot know whether their work meets the fair use standard until after they have already been found liable for copyright infringement.[85]

C. The Law of Accession and the Improving Remixer

The heart of the battle over remix rights boils down to the question of what happens when one artist's imagination builds on another's. Here the value argument that was so crucial to

---

81 Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1563, 1567–1571 (1993) ("[O]nce a creator exposes her intellectual product to the public, and that product influences the stream of culture and events, excluding the public from access to it can harm.").

82 *See* Vrana, *supra* note 24, at 850–54.

83 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

84 *See id.* at 580, 587.

85 *See* Vrana, *supra* note 24, at 849.

understanding Lockean theory is quite uncertain because isolating labor is extremely difficult in the remix context. Consumers enjoy remixes not only because of the changes that the remixer made but also because of the qualities of the original song that are still retained, such as the lyrics, melody, and instrumentation. Moreover, remixers also satisfy the same natural law and maker's rights justifications of labor in the same way as the original artist.

In light of this uncertainty, the law of accession offers some guidance on how property law should measure the value that an individual adds to an object when a product is created through cooperative labor.[86] This doctrine can be seen with one simple tweak to our craftsman example: instead of an abandoned forest, imagine that our craftsman accidentally chopped a tree from a lumberjack's property. According to the law of accession, an individual who innocently takes a previously owned object, transforms it beyond recognition, and adds a significant amount of value in the process will usually gain ownership of the final product.[87] However, this right to ownership does not entirely supplant the rights enjoyed by the original owner; the law of accession also imposes an obligation to compensate the original owner of the raw materials for the lost value. The craftsman would therefore be entitled to keep his handcrafted birdhouses so long as he pays the lumberjack the fair market value for the tree.

According to the law of accession, a remixing artist who innocently takes the song of another artist and alters it in a way that adds value should be entitled to retain a property right in the remix, so long as the remixer compensates the original artist for the value of the raw materials. If the remixer did not have to compensate the original artist for nontransformative uses, the original artist's property rights granted by the labor theory would be completely moot. Remixers could profit off of the labor invested by original artists, without recognizing the property rights of the original artists through prior agreements and licensing fees. Enforcing copyright law acknowledges both the work of the original artist, through any licensing fees or royalties that the artist may receive, as well as the work of the remixer, who can profit either by sales of the remix or increased name recognition and publicity.

Interestingly, the improving trespasser doctrine in adverse possession law might also afford remixers the right to compen-

86 *See* ALEXANDER & PEÑALVER, *supra* note 59, at 48–50.
87 *See id.* at 48–49.

sation if they increase the value of an artist's original song. To illustrate this doctrine, imagine that an individual mistakenly builds a new house on her neighbor's lot, all the while believing that lot to be her own because of a surveying error. In the United States, most states afford some relief to such an improving trespasser.[88] To prevent the lot owner's unjust enrichment, a good faith improver can either remove the improvement she added or receive compensation equal to the increase in market value of the lot owner's land. In the intellectual property context, a similar situation might arise if a famous remixer improves upon the track of a relatively unknown artist. By taking the artist's song and turning it into a viral hit, the remixer has arguably contributed far more value to the resulting remix than the original artist; without the work of the remixer, the original artist's song might have remained undiscovered. In such circumstances, the improving trespasser doctrine might prevent the unjust enrichment of the original artist by requiring that she compensate the remixer for the increase in market value of her song. Once again, however, issues of indeterminacy in isolating labor remain.

It is worth noting that the law of accession's good faith requirement would exempt remixers who knowingly disregard copyright law and SoundCloud's terms of use.[89] Yet copyright law is complex, and many SoundCloud users likely do not understand the nuances of the fair use doctrine. SoundCloud would therefore do well to outline the fair use defense in more detail, lessening the likelihood that a remixer could hold a good faith belief that their tracks are exempt from copyright infringement. While SoundCloud advises users to obtain authorization from artists rather than rely on the fair use defense, SoundCloud also suggests that those who wish to rely on fair use should "consult with a suitably qualified lawyer before uploading anything."[90] This is problematic because most remixers on SoundCloud are amateurs who likely lack the resources to hire such counsel. Good faith exception or not, however, the law of accession still illustrates the balance that needs to occur in order to pay respect to both the artist's right in an original song and the remixer's right in the new rendition.

---

88 *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 510 (3d ed. 2012).

89 *See* Hermann, *supra* note 2 (sharing the stories of remixers who knowingly disregard SoundCloud's terms of service).

90 *Learn About Copyright*, SOUNDCLOUD, https://soundcloud.com/pages/copyright [https://perma.cc/W959-K5UE].

III
FOSTERING MUSICAL CREATION: UTILITARIAN THEORIES OF INTELLECTUAL PROPERTY

A. The Tragedy of the Free Rider

Utilitarianism evaluates whether actions, rules, and institutions are right or wrong based on the consequences they bring about, and in turn, whether these consequences tend to maximize utility or welfare.[91] Rather than a single utilitarian theory, there are many theories that are influenced by the philosophy of utilitarianism. One of these theories is the classic "free rider" problem. This account illustrates the underproduction that occurs when an open-access regime fails to provide adequate incentives for individuals to engage in labor.[92] To see how this phenomenon works in practice, imagine an open-access field that is being used to grow corn. In order to eat the corn that grows in this open-access field, however, individuals need to help till, sow, weed, and harvest the crop. Yet the users of the field did not build a fence around their property, and they therefore have no power to exclude farmers who do not contribute any labor from harvesting the corn at the last minute. Under the rational actor model of utilitarianism, an individual actor acting independently will always take the self-interested route, even if this cost-benefit analysis leads to behavior that is contrary to the best interests of the whole group. The most cost-effective course of action for a rational actor would be to avoid contributing labor while others do all the work and then suddenly swoop in when the crops are ready for harvest. Yet if each individual thinks about utility on such an individual scale, no one will ever have any corn to eat.

The free rider problem applies with just as much force in the realm of intellectual property. If an artist cannot reap the full benefits from her songs, which she invested time, money, and labor in creating, utilitarian theory suggests that this artist will not invest as heavily in her craft as she otherwise would have—if she even chooses to continue investing in her craft at all. While this result might not be as easy to observe as corn failing to grow in a field, upon deeper inspection the disadvantages of the free rider problem begin to appear in the intellectual property context, too. For example, many tracks on SoundCloud are only remixed minimally, while others are identical to the original and merely disguised as a remix so people

---

91 *See* ALEXANDER & PEÑALVER, *supra* note 59, at 11.
92 *See id.* at 22.

can listen to or download these songs for free. Such practices are likely to interfere with the original song's market sales; free access to slightly modified versions of a song may satisfy consumers who otherwise would have paid for the original version.[93] Indeed, some artists will refuse to release their music to the public unless it is properly protected—either because they feel their work is being devalued or because they have found a more profitable career path.[94] Though difficult to measure, this negative utility would be felt not only by artists exiting the industry but also by the larger community of music consumers who have less music to choose from. Creating and protecting intellectual property rights in an artist's music therefore provides incentives for the artist to engage in the labor necessary to produce such music, which consequently brings utility to society on a large scale.

On the other hand, too many restrictions on intellectual property can also stifle innovation and creativity. Depriving remixers of access to prior creations is fatal to their craft; remixes necessarily require the use of prior songs, by definition. If it were overly burdensome or expensive for remixing artists to use original songs as the bedrock of their creations, the public would have less remixes available to listen to. Perhaps only the most mainstream DJs would be able to engage in this art form, leaving young, aspiring remixers without the ability to share their work with a mass audience and gain a following of their own. SoundCloud's easily accessible remixes therefore bring utility to the public at large.

As with Lockean theory, there are still complications to the application of utilitarianism in the intellectual property context. First, utilitarian theory relies heavily on the assumption that individuals invariably abide by the rational actor model. Yet people in a particular community are not always self-interested.[95] These individuals therefore cannot fit neatly into a rational actor model that assumes people make their decisions using an individual, cost-benefit calculus that prioritizes creat-

---

93 *See* IVAN L. PITT, DIRECT LICENSING AND THE MUSIC INDUSTRY: HOW TECHNOLOGY, INNOVATION AND COMPETITION RESHAPED COPYRIGHT LICENSING 199–204 (2015).

94 *See* Jacob Ganz, *The Decade in Music: How Musicians Create*, NPR (Dec. 3, 2009, 3:09 PM), http://www.npr.org/2009/12/03/121061383/the-decade-in-music-how-musicians-create [https://perma.cc/5Q6B-QDSS] (describing the meaning behind singer-songwriter Gillian Welch's song, "Everything Is Free": "It's the ultimate threat that the artist has at any point to stop sharing their art with the world. And what's sort of implied in our song is, 'I can keep doing what I do and I can entertain myself and don't need to take it out of my living room.' If it ceases to be feasible to make a living, I could just stop going public.").

95 *See* ALEXANDER & PEÑALVER, *supra* note 59, at 25.

ing the greatest net wealth. Sometimes individuals are altruistic; these individuals will naturally refrain from using resources in an open-access regime as aggressively as possible so that others can share in the resources as well. A remixer might seek out the permission of the original artist not out of fear of being sued, but out of gratitude toward the artist. Similarly, some artists might not care about remixers using their music and then giving away the remixes as free downloads. These artists might desire to help remixers build their careers, or perhaps they simply enjoy the flattery. A quick look at SoundCloud and remix culture in the news, however, illustrates that for the most part the players involved are acting as rational actors would act. Girl Talk has no interest in paying the hundreds of artists that he has sampled out of the generosity of his heart. Meanwhile, last year Universal Music Group and Sony Music Entertainment were reportedly preparing to file lawsuits against SoundCloud for "massive copyright infringement," as they have no interest in helping remixers profit off their artists royalty free.[96] The rational actor model therefore seems like a fair starting point for an application of utilitarian theory—while also keeping in mind that copyright law should leave room for those who wish to break the mold of the rational actor model, such as artists who offer their tracks to amateur remixers for free through Creative Commons licenses, for instance.

Given such a wide range of human interests, even within the relatively small context of the remix culture, utilitarianism's attempt to create a complete account of aggregate well-being on a single value is a tall order. It is difficult to say with certainty, for instance, that the added utility of widely available remixes outweighs the negative utility generated by the disincentives for original artists to create. Any policy proposals utilizing this theory in the intellectual property context would be smart, therefore, to incorporate both perspectives in its calculus to find the optimal balance rather than prioritizing one side over the other wholesale.

---

96 Pulkit Chandna, *Rumor Has It Universal Music Group and Sony Music Are Gearing Up to Sue SoundCloud for 'Massive' Infringement*, TECHHIVE (June 24, 2015, 9:47 PM), http://www.techhive.com/article/2940554/rumor-has-it-universal-music-group-and-sony-music-are-gearing-up-to-sue-soundcloud-for-massive-infr.html [https://perma.cc/7Y9W-R9CE] (quoting Paul Resnikoff, *Exclusive: Soundcloud Bracing for Massive Copyright Infringement Lawsuits . . .*, DIGITAL MUSIC NEWS (June 22, 2015), http://www.digitalmusicnews.com/2015/06/22/exclusive-soundcloud-bracing-for-massive-copyright-infringement-lawsuits/ [https://perma.cc/XUE2-3EHA]).

B. The Freedom in the Commons

Not all utilitarian scholars fret over the free rider problem, such as Yochai Benkler, who views open-access regimes in a far more favorable light.[97] In his lecture, *Freedom in the Commons*, Benkler contends that the technological revolution has made a public domain of information and culture both plausible and desirable.[98] The rise of technology has created what Benkler calls the "networked information economy," an economy where information and culture flow throughout society across a decentralized network of individuals, rather than a centralized network of large companies.[99] Benkler highlights the enormous potential of the Internet, through its democratization of the way that we produce culture, to promote individual creativity and diversify social discourse.[100] In the process, Benkler notes that these nonmarket and decentralized models of production can increase their presence alongside the more traditional, commercial models—surely causing some displacement but not enough to displace businesses and markets entirely.[101]

Benkler's theory, while controversial to proponents of strong intellectual property protection, remains rooted in utilitarian theory and has significant implications for remix culture. In a networked information economy, Benkler asserts, robust intellectual property rights can lead to economic inefficiencies, especially with respect to nonmarket actors.[102] For example, amateur remixers cannot make valuable contributions to the music industry if they lack the financial resources to gain access to original songs protected by robust rights. An aspiring DJ living in his parents' basement likely does not have the resources to get approval from the record label that released a song that he wants to remix. He might therefore be limited only to songs that artists have released under a Creative Commons license. Moreover, nonmarket individuals no longer need access to a professional studio or a record label to craft and distribute a quality remix. Aspiring DJs can use widely available cheap processors such as their laptop com-

---

97 Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1245–50 (2003).

98 *See* GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 227 (2012).

99 Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, *in* PROPERTIES OF PROPERTY, *supra* note 98, at 217, 218–21.

100 *Id.*

101 *Id.* at 219.

102 *Id.* at 218.

puters, thereby reducing the physical capital costs associated with the production and distribution of a song.[103] Despite the potential for such a thriving, cost-efficient addition to the music industry, restrictive intellectual property rights could chill such production.

Not only does Benkler note that the networked information economy makes sense from an economic perspective but he also notes that it is desirable from a political perspective. Benkler argues that proprietary- and market-based production has "dampening effects" on two core values: democracy and autonomy.[104] A market-based system that enforces property rights forces individual consumers to pay market-based providers.[105] This system allows the mass media to define cultural meaning in society rather than society itself.[106] When nonmarket participants such as the amateur remixers of SoundCloud participate in the dissemination of cultural products, our music industry becomes more musically diverse and democratic. Without these nonmarket actors, we likely would never experience the joys of a Bhangra-inspired Beyoncé remix or a 1980s take on Justin Bieber; there is simply not a mass media market for such creations.[107] Yet there is value in a diverse array of tunes for us to choose from. The networked information economy also fosters individual autonomy, as it allows individuals to retain more control of the media that they consume—rather than passively letting a monopoly of record companies serve as gatekeepers for their musical taste.[108]

Certainly Benkler's argument, if taken to the extreme, would have drastic consequences for the music industry. If all artists had to place their tracks in an open-access system where users could freely download, alter, and resell them, many original artists would think twice before releasing music to the public. Although rendering music into an open-access system might dampen that music's market potential, in the remix culture this effect is slightly less extreme. An open-access system and a market for original songs are not mutually

---

103 *See id.* at 221.
104 *Id.* at 222.
105 *See id.* at 223.
106 *See id.* at 222–23.
107 *See* Spirit Fingaz, *Beyonce Vs Firewater – Bhangra Ladies (DJ Spirit Fingaz Mashup)*, SOUNDCLOUD (2011), https://soundcloud.com/spiritfingaz/beyonce-vs-firewater-bhangra [https://perma.cc/W2S7-TRT3]; TRONICBOX, *What Do You Mean It's 1985 – Justin Bieber*, SOUNDCLOUD (2016), https://soundcloud.com/jerry-shen-403158940/what-do-you-mean-its-1985-justin-bieber [https://perma.cc/H5ZX-GLJC].
108 *See* Benkler, *supra* note 99, at 222–25.

exclusive; although some listeners might choose to listen exclusively to amateur remixes, certainly others will still pay to own the original artist's vision of the song. Moreover, the remix realm is only a small portion of the music industry. Musicians will still have plenty of motivation to remain in the industry—not just from sales of their original songs but also from touring, merchandise sales, and endorsement deals. Of course artists also create music for psychologically rewarding reasons as well, but artists' economic incentives are far more meaningful in practice.

In order to find the optimal utilitarian balance between artists' rights and remix rights in Benkler's public domain, however, certain protections for original artists need to be implemented. Once an item is put into an open-access system, it becomes "an attractive target for the mischief-makers, proprietary competitors, free-riders, sketchy opportunists, and well-meaning dolts" who can drive away the very creators that the system depends on.[109] By monitoring sharing platforms for any signs of foul play, such as users who post bootleg copies of original songs, platforms like SoundCloud can better align the interests of both the original artist and the remixer.

IV
THE SOUL BEHIND THE SONGS: PERSONHOOD THEORY OF INTELLECTUAL PROPERTY

A. An Introduction to Personhood Theory

While personality theory has long been a prominent feature in French and German copyright regimes, the theory did not have much prevalence in American law until recently.[110] This recent interest in the United States is largely due to Margaret Jane Radin's personhood theory, which states that to achieve proper self-development and flourish as a human being, an individual needs some control over resources in that individual's external environment.[111] Her theory is an intuitive one; nearly everyone can relate to the notion that certain goods are so inextricably bound up in ourselves that they are vital to our sense of self-development. Radin appeals to this notion

---

109 ALEXANDER & DAGAN, *supra* note 98, at 227 (quoting Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472 (2007)) (citing Lior Strahilevitz's critique of Benkler's theory).

110 *See* William Fisher, *Theories of Intellectual Property*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 173, 174 (Stephen R. Munzer ed., 2001).

111 Margaret Jane Radin, *Property and Personhood*, *in* PROPERTIES OF PROPERTY, *supra* note 98, at 17, 17.

through everyday examples, such as an irreplaceable wedding ring that symbolizes your marriage or the house that you call home. Radin's continuum of property rights ranges from "fungible" to "personal;" wedding rings and homes give rise to personal rights. These rights are held for sentimental reasons, and they are irreplaceable. On the contrary, fungible rights are held only for instrumental reasons and goods of equal market value can replace them.[112]

Radin identifies two features of personal rights that help explain why these rights are so intimately bound up with self-identity. First, these rights represent an individual's past experiences as well as that individual's expectations for the future. Second, loss or damage to these rights are "experienced as violations of their owner's self, which transcend the financial set-back involved."[113] Given the inability of the market to account for the value of these rights, Radin asserts that personal rights should receive more protection than fungible rights that lack this distinctive quality.[114] Although Radin calls for a sufficiently objective criteria for determining the point at which a property right becomes personal rather than fungible, her approach has been criticized for requiring the law to evaluate the specific relationship each individual has with the object at issue.[115]

B. The Personhood Right in Remix Culture

An artist's craft is just as intuitively wrapped up in that artist's sense of self as a person's wedding ring or house. Given how intimately connected artists are to their work, an artist's intellectual property therefore seems to fall toward the personal rights end of Radin's continuum. Songs are intensely personal creations; artists often express their innermost thoughts through music—thoughts that they might not feel comfortable simply saying aloud, even to their closest confidants. Music is wrapped up in the past events and feelings that constitute an artist's life, as well as current identity and expectations for her future self. Moreover, musicians do not make music merely for instrumental reasons—though for many this is an important factor, as artists need to earn a living. Many artists make music for more personal reasons as well, such as self-expression and a sense of fulfillment. Additionally, many musicians

112 *Id.* at 18.
113 ALEXANDER & DAGAN, *supra* note 98, at 24–25.
114 Radin, *supra* note 111, at 22, 24.
115 *See* ALEXANDER & DAGAN, *supra* note 98, at 26.

are highly protective of their work and do not easily hand over the rights to their songs to record labels, for example.

The personhood theory presents an interesting dilemma in the remix context. On the one hand, an artist's rights in her music seem deserving of a heightened level of protection over bootlegged remixes that could distort that artist's intention for the song. If an artist were to create a heartfelt song about the loss of a loved one, for instance, she might likely be upset to see an electronic dance music version of her song distributed on a large scale basis, without even as much as her approval or acknowledgment. As favorable as the personhood theory might seem to original artists, however, this theory affords protections to remixers, too. In the same way that an original artist would feel intimately attached to her creation, so too would a remixer who poured all of their creative energy into their track, even if they did not create the lyrics or melody from scratch. Yet without any property rights in his creation, a remixer might lack the sense of control and ownership that Radin contends is so crucial to self-development.[116] However, a remixer can still retain control over his intellectual property without having full possession over the corresponding right. A remixer could still develop their identity by posting remixes to SoundCloud, all the while sharing a piece of the ownership—through royalties, for example—with the original artist. Granted, it would be difficult to inquire into the subjective personal attachment that each artist or remixer has to her work. This task is already difficult enough in the realm of physical property, let alone intellectual property. Yet through careful research, it would not be impossible for policymakers and legislatures to create some objective standards outlining where these rights should fall on Radin's spectrum.

Even if original artists received royalties, however, it is questionable whether money really reinstates the personhood right. After all, personal rights transcend market forces; they are not replaceable by goods of equal market value like fungible rights are. Yet by creating a public good like a song to be shared with millions, at a certain point the original artist has to acknowledge that they cannot control every aspect of their work once it is released to the public. The song may grow to have a life of its own, interpreted differently by individuals who all bring different perspectives to the song. This is why cover songs are so popular on YouTube for example; it can be a

116 Radin, *supra* note 111, at 17.

transformative experience to hear a popular song completely reinterpreted by a new artist who brings new meaning to the song. In order to properly acknowledge the original artist's personhood right in the remix context, royalties therefore seem like a fair compromise. A royalty structure ensures that both parties, who each have personhood rights in their creations, are acknowledged.

CONCLUSION: SOLVING THE REMIX RIGHTS STALEMATE

An examination of Lockean labor theory, utilitarian theory, and personhood theory reveals that property theory is capable of justifying not only the legal protection of physical property but also the legal protection of intellectual property. Yet each of these theories also reveals drawbacks to recognizing excessively robust rights in intellectual property. In any context where two opposing groups of people have conflicting interests, compromises will have to be made. These three property theories suggest that retaining intellectual property rights, yet qualifying them accordingly when countervailing considerations come into play, will strike the optimal balance between original artists and remixing artists on music-sharing platforms.

The application of property theory to the intellectual property context sheds insight on some solutions that could better align the interests of remixers and rightsholders. For example, SoundCloud's shift to a monetized model exemplifies the symbiosis that can happen when Lockean labor theory, utilitarian theory, and personhood theory are all taken into account. By distributing royalties to both the remixer and the original artist, SoundCloud recognizes the valuable labor that both parties have expended into the creation of their respective artworks, incentivizes both parties to continue creating the music that brings utility to society, and respectfully acknowledges the personhood interest that is intimately intertwined with their music. This synergy between remixer and original artist is now a possibility under SoundCloud's new "Premier Partnership" plan, whereby artists who join this membership tier can start making money on the platform.[117] Even under the free version of SoundCloud, however, SoundCloud's licensing deals with record labels allow remixers to benefit from increased name

117 *Premier Partnership on SoundCloud*, SOUNDCLOUD, https://on.soundcloud.com/premier [https://perma.cc/KH4U-AVPR].

recognition, while the platform can still compensate the original artists that the rising stars of the remix world rely on.

Although the monetization of remix audio-sharing platforms is a vast improvement over their royalty-free past, these restructurings do not resolve larger issues such as the uncertainty of fair use that frustrates many remixers. When an audio-sharing platform removes an amateur remixer's track at the request of a large record label who retains the copyright, it is highly unlikely that remixer will have the resources or motivation to assert a fair use defense in court against the Warner's of the world.[118] This dilemma poses an imbalance with respect to each of the three property theories. When audio-sharing platforms remove remixes that might very well qualify as fair use, these removals harm a remixer's right to the resources from his labor, reduce the amount of utility-enhancing, innovative art available for music consumers, and delegitimize the remixer's sense of self that is intimately bound up in his creation.

One solution to this issue lies in the legalization of noncommercial, amateur remixing.[119] This could be adopted in the form of a separate defense to copyright infringement aside from fair use or even an aspect of fair use itself. This policy would free amateur remixers from the burden of negotiating and securing licensing agreements—a luxury that most remixers who are not intending to commercialize their work cannot afford.[120] Additionally, this policy would assuage the minds of risk-averse remixers who are too concerned about copyright infringement to post their tracks online. Since this policy would only apply to noncommercial remixes, the defense would vanish once a remixer tried to profit off an unauthorized work. Limiting the defense to noncommercial remixers ensures that original artists receive compensation once the remixer starts to earn revenue. In this way, the labor and personhood interests of original artists would remain largely intact, and they would not lose any significant utilitarian incentive to continue creating their own craft. As to the remixers, they would benefit in having a greater sense of ownership over the deeply personal creations that they labored over. Moreover, without the worry of whether their works will be removed from audio-sharing

---

118 *See* Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. U. L. REV. 383, 387 (2015).

119 *See id.* at 427.

120 *See id.* at 429.

platforms or infringe copyright law, remixers would feel encouraged to actively participate in these communities. This boost in utility for remixers would flow downstream to the larger music community, as listeners would have a more vibrant and diverse collection of songs to choose from.

This solution assumes, however, that noncommercial remixes on platforms like SoundCloud do not significantly decrease the market demand for commercial remixes. If the availability of noncommercial remixes does in fact dampen market demand, then legalization of this art form could interfere with the right of original artists to create their own derivative works. For example, even though a nonprofessional remixer who uploads her track on SoundCloud may not reap any royalties, her remix might nevertheless divert royalties away from the original artist and publisher. The reason for this diversion would be twofold: not only would the remixer be entitled to use the original artist's song for free but her noncommercial remix might also take away market share from professional remixers, who in turn pay the original artist.

However, many commentators believe that remixes actually boost the popularity of the original artist's song, as new listeners might be drawn to artists whose works were sampled.[121] Moreover, if a remixer's track becomes popular and she decides to commercialize it, original artists will reap royalties as they share in the profits. No solution is perfect, but if the aim of copyright law is to foster artistic innovation, a defense for noncommercial remixing might strike the best balance between the interests of all involved.[122] Indeed, the Supreme Court noted that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."[123] Remixes are an immensely transformative art form, and a noncommercial remixing defense could help ensure that the uncertainty of the fair use doctrine does not stifle such creative expression.

The importance of striking the right balance between remixers and rightsholders expands far beyond the boundaries of audio-sharing platforms themselves. The effects of these policies ripple outward and send signals about how our society

---

121 *See id.* at 437 (explaining how DJ Danger Mouse's *The Grey Album* "likely served as a music discovery tool" for listeners who previously were not fans of the Beatles or Jay-Z, the two artists that DJ Danger Mouse fused together in his mash-up).

122 *See id.* at 387.

123 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

values artistic innovation and intellectual property rights. Finding a point of equilibrium between two vastly different types of artists is no easy task. This aim for balance requires compromise, and the nuanced property theories that scholars have discussed and dissected over the years provide a useful starting point. As these solutions illustrate, the application of property theory to the intellectual property context can profoundly revitalize discussion about copyright law and remix culture among both policymakers and major industry players. And in a music industry that is rapidly evolving in today's user-generated remix culture, this discussion is one that has never been more crucial to have.